Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

REPLY COMMENTS OF CENTURYLINK ON THE FURTHER INQUIRY INTO TWO UNDER-DEVELOPED ISSUES IN THE OPEN INTERNET PROCEEDING

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SUMMARY

The most recent round of comments in the Commission's "Open Internet" proceeding show why imposing Title II-like rules is unwise for any Internet broadband service. The relatively unhelpful, high-level political debate between anti-and pro-regulation advocates only highlights the lack of any compelling reason to regulate the Internet beyond applying the four principles already-established by the Commission. Indeed, the comments calling for greater regulation of specialized services actually make a strong case *against* rather than for regulation, even of mass market broadband services.

Free Press made this point, most likely unwittingly, when it asserted that network operators should not receive "a get out of jail free card" by allowing broadband providers to avoid "Open Internet" rules for specialized services. If the rules are in any way the equivalent of "jail", then the Commission would be wise not to adopt them at all. After all, broadband providers are not criminals, but are entrepreneurs whose investments and expertise are essential to bringing the value of the Internet to the public. The National Broadband Plan emphasizes the need to promote broadband investment by working with—not against—broadband providers to maintain extend, and upgrade broadband for all Americans. "Open Internet" rules will undermine the necessary investment and service quality such goal requires. The Commission should not adopt the "Open Internet" rules proposed in the proceeding, much less extend them to specialized services, as this will only reduce investment and deny consumers the broadband and specialized services that are critical to reaching the National Broadband Plan's goals.

The specific new regulations that regulation advocates proposed—nonreplication and guaranteeing the availability of capacity—are unnecessary in light of marketplace competition. In today's marketplace, a broadband provider cannot long survive unless it is customer-focused

and invests in the network, provides quality service, and engages in business practices that customers expect. Other proposed rules ostensibly designed to prevent anticompetitive behavior hearken back to obsolete and long-discarded rules that made sense only for rate-of-return regulated utility monopolies of another era. In stark contrast, many parties on this record have shown that the market for specialized services is vibrantly competitive and needs no further regulations. Indeed, broadband providers like CenturyLink deploying new services like IPTV are new entrants entirely lacking market power.

If the Commission nevertheless imposes Title II-like regulations on broadband Internet access service, it cannot exclude mobile services. First, while wireless carriers face challenges in managing their networks, these issues are fundamentally no different from what wireline providers face in developing their networks. Second, given that the National Broadband Plan relies heavily on the future existence of wireless broadband services and competitive alternatives to wireline providers, it would be inconsistent with FCC policies to apply different rules to wireless providers. Third, applying different rules to wireless providers would skew competition because all broadband providers operate in the same marketplace for the provision of broadband Internet access service. Fourth, such differential treatment would be unlawful, as it would be arbitrary and capricious regulation in violation of the Administrative Procedures Act.

New regulations are unnecessary and even harmful to broadband investment. As the Commission has recognized, the most critical step in making progress on the National Broadband Plan is ensuring the government "does no harm." Such a philosophy underscores the importance of minimizing regulation in the broadband service marketplace. The Commission can accomplish all of its oversight goals, and promote greater investment and deployment, simply by continuing to exercise its Title I authority over broadband.

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Comments filed in this proceeding,[1] have done little to move the "Open Internet" debate beyond the initial divide between those who champion regulation and those who highlight the harmful impact regulation can have on a successful market. The high-level political debate is frankly unhelpful as it is couched in generalities and ungrounded hypotheticals. Nevertheless, it does show there is no compelling reason to expand Internet regulation beyond applying the four already-established Internet principles previously adopted by the Commission.[2] There can be no honest disagreement with the observation that these principles are working well for consumers today without any real "Open Internet" problems that need addressing.

The *Notice* comments also clearly demonstrate that extending "Open Internet" rules to "specialized services" would undermine investment and service quality, threatening the market-oriented returns necessary to justify the investment in more and faster broadband. Indeed, the

[1] Public Notice, *Further Inquiry Into Two Under-Developed Issues In The Open Internet Proceeding*, GN Docket No. 09-191, DA 10-1667 (Sept. 1, 2010) ("*Notice*").

[2] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986, ¶ 4 (2005) (*Internet Policy Statement*).

comments calling for greater regulation of specialized services actually make a strong case *against* rather than for regulation, even of mass market broadband services. Moreover, it is particularly clear that it would be even more inappropriate to try to exempt one type of broadband provider—wireless companies—from regulations that would be applied to direct broadband competitors and are applied to wireless carriers now for voice services. On balance, the comments also establish that Title I rather than Title II jurisdiction should continue to apply for all broadband Internet access service providers.

I. THE DEBATE ABOUT APPLYING "OPEN INTERNET" PRINCIPLES TO SPECIALIZED SERVICES EXPOSES THE SERIOUS PROBLEMS WITH IMPOSING REGULATION ON BROADBAND SERVICES.

To date, the main controversy over "Open Internet" principles has been whether the Commission can or should apply Title II regulation, particularly a broad antidiscrimination rule, to broadband Internet access service.[3] Although previous comments fully briefed this issue, recent debate has focused more specifically on whether Title II should apply to "specialized services"—such as IPTV and dedicated broadband services for hospitals or educational institutions—in addition to broadband Internet access service.[4]

This issue has only become more clouded because even the original proponents of Title II treatment of Internet access services, such as Google, doubt the need for open Internet rules for specialized services.[5] Some content and applications providers, however, in addition to certain

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[3] *Preserving the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 09-191, WC Docket No. 07-52, 24 FCC Rcd 13064, ¶ 104 (2010) ("*Open Internet NPRM*").

[4] Even the FCC originally posited that "managed services", another formulation of the same type of specialized service, should be free from the open Internet regulations proposed by the Commission. *Open Internet NPRM,* ¶¶ 148-53.

[5] *See, e.g.*, Reply Comments of Google Inc., GN Docket No. 09-191, 47 (Apr. 26, 2010).

self-styled consumer advocates, continue to stretch the original intent of the "Open Internet" rules to encompass more and more situations, demonstrating a misplaced disagreement with our market economy.[6] Notably, other consumer and public interest groups are adamantly opposed to applying rules to specialized services.[7] So are all network providers[8] and a variety of equipment manufacturers.[9]

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[6] *See, e.g.,* Comments of Free Press Regarding Further Inquiry, GN Docket No. 09-191 (Oct. 12, 2010) ("Free Press Comments"); Comments of Public Interest Commenters, GN Docket No. 09-191 (Oct. 12, 2010) (Benton Foundation, Center for Media Justice, Consumers Union, New America Foundation, Public Knowledge, Media Access Project) ("Public Interest Comments"); Comments of the Computer & Communications Industry Association (CCIA) on the Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding, GN Docket No. 09-191 (Oct. 12, 2010) ("CCIA Comments"); Comments of Independent Film & Television Alliance, GN Docket No. 09-191 (Oct. 12, 2010); Comments of Open Internet Coalition, GN Docket No. 09-191 (Oct. 12, 2010) ("Open Internet Coalition Comments").

[7] *See, e.g.,* Comments of National Organizations, GN Docket No. 09-191 (Oct. 12, 2010) (Asian Pacific American Institute for Congressional Studies, Black College Communications, Association, Dialogue on Diversity, Hispanic Technology and Telecommunications Partnership, International Black Broadcasters Association, Japanese American Citizens League, Latinos in Information Sciences and Technology Association, Leadership Education for Asian Pacifics, League of United Latin American Citizens, MANA—A National Latina Organization, Minority Media and Telecommunications Council, National Association for the Advancement of Colored People, National Association of Multicultural Digital Entrepreneurs, National Black Caucus of State Legislators, National Black Chamber of Commerce, National Caucus of Black Mayors, National Conference of Puerto Rican Women, National Hispanic Caucus of State Legislators, National Medical Association, National Organization of Black Elected Legislative Women, National Puerto Rican Chamber of Commerce, National Puerto Rican Coalition, Organization of Chinese Americans, U.S. Hispanic Chamber of Commerce); Comment of Center for Individual Freedom, GN Docket No. 09-191 (Oct. 12, 2010).

[8] *See e.g.*, Comments of Verizon & Verizon Wireless on Under-Developed Issues in the Open Internet Proceeding, GN Docket No. 09-191, 43-65 (Oct. 12, 2010) ("Verizon Comments"); Comments of AT&T Inc., GN Docket No. 09-191, 13-39 (Oct. 12, 2010) ("AT&T Comments"); Comments of the National Cable & Telecommunications Association, GN Docket No. 09-191, 5-11 (Oct. 12, 2010); Comments of CTIA—The Wireless Association®, GN Docket No. 09-191, 16-18 (Oct. 12, 2010) ("CTIA Comments").

[9] Comments of Adtran, Inc., GN Docket No. 09-191, 2-8 (Oct. 12, 2010); Comments of Fiber-to-the-Home Council on the Further Inquiry into Two Under-Developed Issues in the Open Internet Proceeding, GN Docket No. 09-191 (Oct. 12, 2010).

Title II treatment of specialized services would undermine network expansion. The arguments for greater regulation of specialized services demonstrate why Title II principles are seriously burdensome and have no place in the broadband marketplace. Free Press made this point, most likely unwittingly, when it asserted that network operators should not receive "a get out of jail free card" by not applying burdensome "Open Internet" rules to specialized services.[10] If the "Open Internet" rules are in any way the equivalent of "jail", the Commission would be wise not to adopt them at all. After all, broadband providers are not criminals, but are entrepreneurs whose investments and expertise are essential to bring the value of the Internet to the public. The National Broadband Plan emphasizes the need to promote broadband investment, by working with—not against—broadband providers to maintain, extend, and upgrade broadband for all Americans. "Open Internet" rules would serve only to undermine the necessary investment and service quality that are critical to reaching the National Broadband Plan's goals.

The FCC has recognized that it should first "do no harm" whenever it decides to impose regulations on broadband services.[11] As the Commission is well aware, availability of broadband services to all Americans depends on the construction of modern and robust networks.[12] This effort is hugely expensive, requiring enormous and ongoing investment. Indeed, even maintaining current levels of service to existing customers depends on massive

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[10] Free Press Comments at 22.

[11] Federal Communications Commission, Connecting America: The National Broadband Plan, GN Docket No. 09-51, 4 (rel. Mar. 16, 2010) ("National Broadband Plan") ("Our plan must be candid about where current government policies hinder innovation and investment in broadband . . . . [and] correct the problematic policies found here.").

[12] National Broadband Plan at 3, 18-19.

ongoing investment and commitment as bandwidth demands continue to rise. If private funds are to be available for that network construction, operation, and upgrade, the network owner must have the flexibility to be able to provide commercially remunerative services.[13] Those revenues benefit all users, who will be able to obtain their services at reasonable prices. Not only would the regulation advocates' proposed new regulations pose substantial risks to investment, there is no factual basis for misapplying them to broadband services. There are no broadband monopolies that need to be subjected to rate-of-return regulation, yet these rules are only necessary to prevent anti-competitive pricing behavior by monopolists. Separation rules increase carrier costs and reduce innovation.[14] Resale rules unfairly siphon off margins that would justify the investment in the first place.[15] Regulatory rules such as these also inevitably create additional uncertainty, which further undermines investment and innovation.

In today's modern age, building networks requires that multiple services be provided where customers demand them in order to recover costs in the most efficient manner possible. Imposing additional rules reduces operational flexibility, introduces uncertainty, and limits opportunities to generate investment returns. That in turn means that even greater external

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[13] CenturyLink recognizes that some external assistance will be required to provide broadband to high cost and rural areas of the country, because building and operating networks there is simply uneconomic. *Connect America Fund; A National Broadband Plan for Our Future; High-Cost Universal Service Support*, WC Docket No. 10-90, *et al*., Notice of Inquiry and Notice of Proposed rulemaking, 25 FCC Rcd 6657 (2010) ("*Connect America Fund Notices*").

[14] *See* page 8, *infra*.

[15] Congress recognized such an adverse consequence when it established the legal standard for requiring access to unbundled network elements only where a competitor is "impaired" without access to such element. 47 U.S.C. § 251(d)(2)(B). *See also Unbundled Access to Network Elements*, WC Docket No. 04-313, 20 FCC Rcd 2533, ¶ 2 (2005), *aff'd, Covad Commn's. Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

resources are necessary to build out robust networks capable of providing high speed broadband service, especially in rural and high cost areas. Many high cost and rural areas already only marginally justify investment, and imposing rules as the regulation advocates propose would simply render those areas off limits to private investment and increase demands for government investment. The Commission should work with the market rather than disable it.

The regulation advocates' positions would threaten the ability to obtain reasonable revenues from valuable services, thereby destabilizing the market for the very broadband services that those regulation advocates themselves acknowledge are in the public interest, and should be provided to all Americans.[16] The Commission should not adopt the "Open Internet" rules proposed in the proceeding, much less extend them to specialized services, as this will only reduce investment and deny consumers the broadband and specialized services that are critical to reaching the National Broadband Plan's goals

Specific proposed rules are burdensome and unnecessary. The advocates of greater regulation of specialized services typically want the Commission to impose three conditions on the provision of specialized services by broadband Internet access providers. These include (1) prohibiting replication of Internet access services under the guise of a specialized service, (2) guaranteeing the availability of network capacity for Internet access services, and (3) requiring that providers be transparent about terms and conditions of use.[17] A few other commenters also seek various rules designed to prevent ostensibly anticompetitive practices by broadband

[16] Comments of Free Press, GN Docket No. 10-127, 2 (Jul. 15, 2010); Comments of Center for Media Justice, Consumers Union, Media Access Project, and New America Foundation, GN Docket No. 10-127, 2 (Jul. 15, 2010).

[17] *See, e.g.*, Free Press Comments at 8-9; CCIA Comments at 6-9; Public Interest Comments at 11.

providers.[18] A number of parties also advocate requiring that specialized services be narrowly defined or be applied only to a "limited set" of services if they are exempted from "Open Internet" rules.[19]

Even a brief review of the additional regulations favored by the consumer groups show that Title II requirements would be far more intrusive and disruptive to the marketplace than both the Commission and the Chairman have indicated is desirable in proposing the Third Way.[20] The first and second new regulations—nonreplication and guaranteeing the availability of capacity—are entirely unnecessary. There is no basis for assuming that network providers are motivated to anger their customers by failing to provide the quality of service that customers expect. In today's competitive market, there are multiple providers for broadband service. Consequently, any such attempt by a network provider would be self-correcting, because customers vote with their feet and move to a more responsive provider.

These proceedings have already amply demonstrated that the broadband Internet access marketplace has been working very effectively for the benefit of consumers. Market forces discipline network operators to ensure that customers can obtain the services they want at prices and terms they approve.[21] This market-induced self-discipline is reinforced by the massive sunk

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[18] Free Press asks the Commission to prevent favoritism on behalf of an affiliate. Free Press Comments at 16-7. Public Interest Commenters would prohibit "bundling" of specialized services with broadband Internet access services. Public Interest Comments at 11.

[19] Public Internet Comments at 1; CCIA Comments at 6.

[20] *Open Internet NPRM*, ¶¶ 50, 108 & Separate Statement of Chairman Genachowski at 3.

[21] Comments of USTelecom, GN Docket No. 10-127, 1-26 (Jul. 15, 2010); Verizon Comments at 54. The FCC has previously drawn this same conclusion—that there is strong competition for broadband Internet access service—a factual conclusion that has been upheld in court. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al*., CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and

cost investments needed to build and operate broadband networks. Given the salutary effects of competition, Title II regulation in whole or in part is wholly unnecessary and entirely inappropriate for broadband Internet service.

Extending such inappropriate and unnecessary regulation to specialized services would only compound the error, while ultimately harming consumers. The regulation advocates continue to be stuck in outdated thinking from a monopoly era that is long gone. Today's voice and broadband service providers operate in a competitive market and are necessarily responsive to their customers, even if some parties insist on pretending otherwise.

Network providers like CenturyLink have long operated in the competitive world mandated by the 1996 Telecommunications Act—a world where service is all about ensuring a satisfactory user experience. In today's marketplace, a broadband provider cannot long survive unless it is customer-focused and invests in the network, provides quality service, and engages in business practices that customers expect. Regulation advocates are blindly convinced that no degree of competition will ensure that users will be able to access the content of their choice. The Commission, however, recognizes that unfounded perceptions cannot be a basis of sound policy choices. The FCC need not be concerned at the outset with the question of service substitutes or whether broadband Internet access is being provided at sufficient speeds (or capacity). Customer demand for these services will ensure their availability.[22] The FCC certainly should not adopt misguided rules designed to vaguely keep specialized services

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Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 19 (2005), *aff'd sub nom. Time Warner Telecom, Inc. v. FCC,* 507 F.3d 205 (3d Cir. 2007).

[22] If there is a problem the FCC can address these issues on a case-by-case basis.

"limited" in nature, because that would severely interfere with consumer demand and needs, discourage investment, and frustrate innovation.

Calls for even more strenuous nondiscrimination rules to prevent purely theoretical anticompetitive conduct by imposing nondiscriminatory dealing obligations, explicitly hearken back to *Computer II* separation rules[23] that were created under very different circumstances and have long been discarded by the FCC.[24] The *Computer II* separation rules made sense only for rate-of-return regulated utility monopolies. In the modern IP-based world, there are a wide range of providers, vigorously competing in the marketplace and with rates that are established through that competitions. The reality of competition precludes broadband providers from engaging in the anticompetitive behavior the regulation advocates fear. Meanwhile, the FCC retains its existing ability to oversee the industry under Title I.

Both Democrat- and Republican-led Commissions have recognized that imposing such unnecessary structural and other rules increases uncertainty, discourages investment, limits innovation, and increases provider costs—all for no reason.[25] Regulations such as these are plainly anti-consumer in their effect. The sheer breadth of these proposed affiliate transactions rules demonstrates the ill-conceived nature of the antidiscrimination requirement in the first

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[23] *Amendment of Section 64.702 of the Commn's Rules & Regs, Second Computer Inquiry*, Final Decision, 77 FCC 2d 384, ¶¶ 86-132, 201-31 (1980) (*Computer II*), *aff'd sub nom., Computer & Commn's Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[24] *Amendment of Section 64.702 of the Commission's Rules and Regulations,* CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986)("*Computer III*").

[25] *Computer III*, ¶¶ 79-81 (Fowler Commission). The *Computer III* non-structural safeguards were later further eliminated in order to avoid delays in providing new services and to reduce carrier costs. *Computer III Further Remand Proceedings*, 14 FCC Rcd 4289, ¶¶ 5-6 (1999) (Hundt Commission). *See also Wireline Broadband Order*, ¶ 44 (Martin Commission).

place. In these circumstances, the FCC should reject time-worn and wholly obsolete rules applicable to another era.[26]

Current regulatory frameworks will promote customer choice. Many parties on this record have demonstrated that the market for specialized services is vibrantly competitive and needs no further regulations. CenturyLink, together with other network providers, are newly entering the market for specialized services. This includes, for example, the video business, with Internet Protocol Television ("IPTV") offerings in competition with entrenched monopoly cable TV providers. As a new entrant CenturyLink has no ability to dictate market results or undermine customer interests in obtaining program content. In fact, applying "Open Internet" principles to any video business makes no sense whatsoever, because all multichannel video programming distributors ("MVPDs") must manage the content of their offerings in order to operate profitably. Government policymakers have long recognized the consumer benefits of allowing video platform providers to arrange for and bundle their services in ways that consumers want and which allow reasonable returns.[27] Regulations have been limited to only a few access rules related to carriage of over-the-air-television stations, public interest channels, and limited commercial access rules to address specific demonstrated factual issues.[28] Other

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[26] In addition, a transparency rule might not result in serious harm, although such a policy is unnecessary. CenturyLink has always provided consumers with sufficient information concerning the terms and conditions of its broadband offerings and has no problem with continuing to do so, although there is little reason to adopt a rule given market forces.

[27] *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, MB Docket No. 03-172, 19 FCC Rcd 1606 ¶¶ 173-76 (2004). Efforts to modify the "discriminatory" behavior associated with tiered programming have always been resounding political failures. *See, e.g.*, *Senate Committee Rejects McCain's A La Carte Cable Provision*, Media Daily News, (Jun. 29, 2006), *located at* http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art_aid=45098.

[28] 47 U.S.C. §§ 531-32, 534-35. Dish Network wrongly argues that a nondiscrimination

than a few isolated allegations, no one on this record has provided any factual justification sufficient to impose these sweeping regulations for the new service. The FCC should not risk undermining the provision of innovative new specialized services—nor risk losing the benefits of investment, innovation and competition—by imposing needless "Open Internet" rules.

II. IF THE FCC WERE TO IMPOSE TITLE II REGULATION ON BROADBAND INTERNET ACCESS SERVICES, IT CANNOT EXEMPT WIRELESS BROADBAND PROVIDERS FROM SUCH REGULATIONS.

Wireless commenters continue to insist that, if the FCC were to adopt the Third Way regulatory scheme, it should exempt wireless providers from those rules.[29] No one has adequately made a case for imposing any Title II-like regulation on any broadband provider, but the worst possible outcome would be for the FCC to attempt to discriminate in imposing those rules.

On this point alone, the regulation advocates in this docket are right: the FCC cannot justify giving special regulatory treatment to wireless providers.[30] Wireless providers suggest that wireless networks are unique and that services and handsets are an integral part of that radio

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principle must be applied to broadband Internet access providers to ensure access to programming. Comments of Dish Network L.L.C., GN Docket No. 09-101, 5 (Oct. 12, 2010). Although Dish Network may need to gain government leverage in order to reduce its programming costs for its video business, it has provided no information that "Open Internet" rules are necessary. Rather, reform and rigorous enforcement of the FCC's retransmission and program carriage rules would address Direct TV's arguments in a more direct fashion than the blunt instrument of "Open Internet" rules. 47 U.S.C. § 548 (program access); 47 C.F.R. § 76.64 (retransmission consent); Public Notice, *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend The Commission's Rule Governing Retransmission Consent*, MB Docket No. 10-71, 25 FCC Rcd 2731 (Mass Med. Bur., 2010)(retransmission consent).

[29] CTIA Comments at 1; Verizon Comments at 11-43; AT&T Comments at 41.

[30] Free Press Comments at 19-24; Public Interest Comments at 4-5; Open Internet Coalition Comments at 5-7.

network.[31] That "uniqueness" argument does not withstand scrutiny for several compelling reasons.

First, wireless carriers are not alone in facing challenges in managing their networks, including capacity constraints occasioned by broadband services. These management issues are fundamentally no different for wireless providers from what wireline providers face in developing their networks to accommodate more robust and faster broadband. Qwest rightly explained that there is no basis for distinguishing between wireline and wireless networks on this issue. Any such distinction would inevitably be "arbitrary and capricious" because wireless company arguments are "distinctions without a difference"[32] "[E]ach of the potential concerns raised . . . as alleged reasons for lighter regulation of wireless networks apply equally to wireline networks."[33] Windstream echoed that sentiment when it stated that "[t]he alleged differences between wired and wireless networks are at most matters of degree, not kind, and do not justify placing the technologies under entirely different regulatory standards."[34]

Second, it would be broadly inconsistent with FCC policies to apply rules to wireless providers that are different from those imposed on wireline providers. The National Broadband Plan emphasizes at length the positive impact that wireless broadband can have in America, particularly in areas that are most difficult to serve with other technologies.[35] The Commission

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[31] Verizon Comments at 16-20; AT&T Comments at 57-63; CTIA Comments at 16-17.

[32] Comments of Qwest Communications International, Inc., GN Docket No. 09-191, 13-14 (Oct. 12, 2010) (Qwest Comments").

[33] *Id*. at 14.

[34] Comments of Windstream Communications, Inc., GN Docket No. 09-191, 7 (Oct. 12, 2010) ("Windstream Comments").

[35] National Broadband Plan, Chapter 5.

staff's analysis about the costs of providing broadband services to the nation's highest cost areas relies heavily on the costs of deploying newer wireless 4G service.[36] A wireless exemption would not only send inconsistent policy signals, but it also would risk undermining the Commission's broadband policy goals by signaling that wireless technology somehow cannot provide a "mainstream" broadband service. It would also make no sense. In reality, wireless broadband providers are already in the market, growing rapidly, and successfully offering broadband services to consumers just like providers using other network technologies.[37]

Third, applying different rules to wireless providers would skew competition. All broadband providers operate in the same marketplace for broadband Internet access service. Fixed and mobile wireless broadband already competes with cable and wireline providers, as well as satellite, and is growing fast.[38] In fact, the Commission has justified allocating additional spectrum for the provision of wireless broadband, in large part because it wants to encourage continued growth of this competition to wireline broadband services is important.[39] It is essential that the FCC not impose different regulations, which inevitably would impede

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[36] Omnibus Broadband Initiative, Federal Communications Commission, Broadband Availability Gap, OBI Technical Paper No. 1, at 27-28, 62-83 (Apr. 2010) (released as Appendix C to *Connect America Fund)*.

[37] Remarkably, wireless broadband providers have largely ignored high cost and rural markets, preferring instead to enter metropolitan markets that are already served by other, multiple broadband providers.

[38] Clearwire alone has reached 1.7 million subscribers, and claims its network now covers 62 million people. It also announced deals to provide rebranded wholesale service for companies like Best Buy and Cbeyond. News Release, *Clearwire Reports Strong Second Quarter 2010 Results* (Aug. 4, 2010). Sprint Nextel is aggressively marketing its 4G wireless broadband service, which it claims is now available in 61 markets nationwide. News Release, *Sprint Unveils First 4G Mobile Network in the Big Apple* (Nov. 1, 2010).

[39] *See, e.g.,* National Broadband Plan at 84-93; *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report & Order, WT Docket No. 06-150, *et al.*, 22 FCC Rcd 660, ¶ 43 (2007).

investment in one sector, while artificially favoring investment in another. Such regulatory favoritism would also give wireless carriers greater flexibility and purely artificial advantages in the marketplace by allowing them more freedom to innovate and respond to customer needs. If imposing these rules do not make sense for wireless network operators, then they cannot be justified for their wireline competitors either.

Fourth, such disparate, preferential treatment would be unlawful since it would be arbitrary and capricious regulation in violation of the Administrative Procedures Act.[40] Courts have consistently held that an agency may not make distinctions based on different technologies without adequate justification.[41] In line with this legal obligation, the FCC has often emphasized the policy benefits of technological neutrality.[42]

For all of these reasons, the FCC should not exempt wireless from "Open Internet" rules, if it adopts any rules for broadband providers.

III. CONCLUSION

The most recent round of comments in this proceeding plainly show that adopting Title II-like rules for any Internet broadband service is unwise from a public policy standpoint. The record does not establish any need for the regulation, and adopting such rules would serve only to increase costs and uncertainty and diminish investment, especially in high cost and rural areas—undermining the Commission's central goals under the National Broadband Plan. Even

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[40] 5 U.S.C. § 706(2)(A).

[41] *Compare National Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 1000 (2005) (agency must justify any decision to treat services dissimilarly to avoid arbitrary and capricious decisionmaking).

[42] *Federal-State Joint Board on Universal Service,* First Report & Order,12 FCC Rcd 8776, ¶¶ 47-49 (1997). For a more complete refutation of the wireless uniqueness argument, see Qwest Comments at 12-19; Windstream Comments at 6-18.

more damaging would be applying such rules to specialized services because new rules are unnecessary and would undermine investment and innovation for those services. However, if the FCC nerveless insists on imposing Title II-like regulations on Internet access service, it should not exclude mobile services because such discrimination would be irrational and would unfairly skew competition.

New regulations are unnecessary and even harmful to broadband investment. The Commission has recognized that making progress on the National Broadband Plan depends first and foremost on the government "doing no harm." Such a philosophy underscores the importance of minimizing regulation in the broadband service marketplace. Instead, the Commission can accomplish all of its oversight goals, and promote greater investment and deployment, simply by continuing to exercise its Title I authority over broadband.

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